No. 17-5554

IN THE SUPREME COURT OF THE UNITED STATES

DENARD STOKELING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1995), was a conviction for a "violent felony" under the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-5) is not published in the Federal Reporter but is reprinted at 684 Fed. Appx. 870.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2017. On June 12, 2017, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 4, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. A3, at 1. He was sentenced to 73 months of imprisonment, to be followed by two years of supervised release. Id. at 2-3. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. A1, at 1-5.

1. On July 27, 2015, petitioner and an accomplice burglarized a restaurant where petitioner was an employee in Miami Beach, Florida. D. Ct. Doc. 30, at 1 (Mar. 2, 2016). Police officers subsequently approached petitioner as he was reporting to work. Ibid. When the officers asked petitioner whether he had any weapons on him, petitioner stated that he had a gun in his backpack and handed the backpack to the officers. Id. at 1-2. The officers found a semi-automatic firearm, a magazine, and 12 rounds of ammunition in petitioner's backpack. Id. at 2.

2. a. A federal grand jury in the Southern District of Florida returned a one-count indictment charging petitioner with knowingly possessing a firearm and ammunition after having been previously convicted of a felony, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. A2, at 1. Petitioner pleaded guilty. Pet. App. A3, at 1.

b. A conviction for violating Section 922(g)(1) typically exposes the offender to a statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1); Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The first clause of that definition is commonly referred to as the "elements clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016). In Johnson v. United States, 559 U.S. 133 (2010), this Court defined "physical force" under the ACCA's elements clause to "mean[] violent force -- that is, force capable of causing physical pain or injury to another person." Id. at 140.

c. The Probation Office classified petitioner as an armed career criminal under the ACCA based on three prior Florida convictions, including a 1997 conviction for robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1995). See Presentence Investigation Report (PSR) ¶¶ 17, 25; D. Ct. Doc. 40-1, at 2 (Apr. 27, 2016). Under Section 812.13, "'[r]obbery' means the taking of money or other property * * * with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. Ann. § 812.13(1) (West 1995).

Petitioner objected to his classification as an armed career criminal. D. Ct. Doc. 36 (Apr. 20, 2016). He argued, inter alia, that his 1997 robbery conviction under Section 812.13 did not qualify as a "violent felony" under the ACCA's elements clause. Id. at 2-3. Petitioner noted that in 1999, the Florida legislature enacted a separate statute prohibiting "robbery by sudden snatching." Id. at 3; see Fla. Stat. Ann. § 812.131(1) (West 1999) (defining "[r]obbery by sudden snatching"). Petitioner argued that before that statute was enacted, robbery by sudden snatching was prosecuted as robbery under Section 812.13. D. Ct. Doc. 36, at 4. He further argued that "robbery by sudden snatching does not 'have as an element' the use or threatened use of violent force, as necessitated by Johnson." Id. at 5. Petitioner thus

contended that before 1999, Florida robbery in violation of Section 812.13 was not categorically a "violent felony" under the ACCA's elements clause. Ibid.

d. The district court determined that petitioner's 1997 robbery conviction under Section 812.13 did not qualify as a "violent felony" under the ACCA. Sent. Tr. 10-11. The court recited the facts underlying the 1997 conviction -- that petitioner "grabbed [the victim] by the neck and tried to remove her necklaces" while she "held onto" them, id. at 10 -- and concluded that "these facts do not qualify under the existing law to justify an enhancement," id. at 11. The court sentenced petitioner to 73 months of imprisonment. Id. at 23.

3. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. A1, at 1-5.

The court of appeals explained that it had "held many times that a conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the [ACCA], even if it occurred before 1999." Pet. App. A1, at 1 (citing United States v. Fritts, 841 F.3d 937, 938, 943-944 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017), and United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir.), cert. denied, 549 U.S. 941 (2006)). The court observed that in Fritts, it had "specifically rejected the argument that the sudden-snatching statute changed the elements of Florida robbery" and "explained

that the Florida Supreme Court has held that Florida robbery 'has never included a theft or taking by mere snatching.'" Ibid. (quoting Fritts, 841 F.3d at 942). Quoting its reasoning in Fritts, the court explained that the "new sudden snatching statute was apparently needed because . . . robbery did not cover sudden snatching where there was no resistance by the victim and no physical force to overcome it." Ibid. (brackets omitted) (quoting Fritts, 841 F.3d at 943 n.7). The court thus reaffirmed that even before 1999, Florida robbery "require[d] 'resistance by the victim that is overcome by the physical force of the offender.'" Id. at 2 (citation omitted).

The court of appeals also noted the parties' agreement that the district court "erroneously looked to the underlying facts" of petitioner's offense to make its own case-specific judgment about whether his conviction was a violent felony under the ACCA. Pet. App. A1, at 2. The court of appeals explained that the district court should have instead "applied the 'categorical approach,' which 'looks only to the elements of the crime.'" Ibid. (brackets and citation omitted). Applying that approach, the court of appeals determined that Florida robbery is a "violent felony" under the elements clause of the ACCA because "[a]n element of Florida robbery is 'the use of force, violence, assault, or putting in fear,' Fla. Stat. § 812.13, which requires 'resistance by the

victim that is overcome by the physical force of the offender.'" Ibid. (quoting Robinson v. State, 692 So. 2d 883, 886 (Fla. 1997)).

Judge Martin concurred. Pet. App. A1, at 2-5. She viewed state decisional law to illustrate that a Florida robbery conviction between 1976 and 1997 should not be a "violent felony" under the ACCA and disagreed with circuit precedent concluding otherwise. Id. at 2. But she recognized that because petitioner was convicted following that period, any such "mistakes do not affect" him. Id. at 2, 5.

ARGUMENT

Petitioner contends (Pet. 9-26) that his prior conviction for Florida robbery is not a "violent felony" under the ACCA's elements clause. The court of appeals correctly determined that Florida robbery is a "violent felony." Pet. App. A1, at 1. Although a shallow circuit conflict exists on the issue, that conflict does not warrant this Court's review because the issue is fundamentally premised on the interpretation of a specific state law and lacks broad legal importance. Further review is not warranted.

1. The court of appeals correctly determined that Florida robbery, in violation of Fla. Stat. Ann. § 812.13 (West 1995), categorically qualifies as a "violent felony" under the ACCA's elements clause, which encompasses "any crime punishable by imprisonment for a term exceeding one year" that "has as an element

the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i).

a. Florida's robbery statute provides in relevant part that robbery is "the taking of money or other property * * * from the person or custody of another" through "the use of force, violence, assault, or putting in fear." Fla. Stat. Ann. § 812.13(1) (West 1995). Under the putting-in-fear prong, "the fear contemplated by the statute is the fear of death or great bodily harm." United States v. Lockley, 632 F.3d 1238, 1242 (11th Cir.) (brackets omitted) (quoting Magnotti v. State, 842 So. 2d 963, 965 (Fla. Dist. Ct. App. 2003)), cert. denied, 565 U.S. 885 (2011). Thus, "robbery under th[e] statute requires either the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm." Id. at 1245.

In Robinson v. State, 692 So. 2d 883 (1997), the Florida Supreme Court addressed "whether the snatching of property by no more force than is necessary to remove the property from a person who does not resist" satisfies the "force or violence element required by Florida's robbery statute." Id. at 884-885. The court surveyed Florida cases -- including McCloud v. State, 335 So. 2d 257 (Fla. 1976), Montsdoca v. State, 93 So. 157 (Fla. 1922), and various other appellate decisions dating back to 1903, see, e.g., Colby v. State, 35 So. 189 (Fla. 1903) -- and confirmed that "the

perpetrator must employ more than the force necessary to remove the property from the person." Robinson, 692 So. 2d at 886. Rather, there must be both "resistance by the victim" and "physical force [by] the offender" that overcomes that resistance. Ibid.; see also id. at 887 ("Florida courts have consistently recognized that in snatching situations, the element of force as defined herein distinguishes the offenses of theft and robbery.").

Under Johnson v. United States, 559 U.S. 133 (2010), "physical force" for purposes of the ACCA's elements clause requires "violent force -- that is, force capable of causing physical pain or injury to another person," id. at 140, which might "consist of * * * only that degree of force necessary to inflict pain," such as "a slap in the face," id. at 143. The degree of force required under Florida's robbery statute -- "physical force" necessary to "overcome" "resistance by the victim," Robinson, 692 So. 2d at 886 -- satisfies that standard. Force sufficient to prevail in a physical contest for possession of the stolen item is necessarily force "capable" of "inflict[ing] pain" equivalent to "a slap in the face," Johnson, 559 U.S. at 140, 143; Florida robbery could not occur through "mere unwanted touching," id. at 142. The court of appeals thus correctly determined that because the "force element of Florida robbery satisfies the elements clause of the [ACCA]," Florida robbery is categorically a "violent felony." Pet. App. A1, at 2.

b. Contrary to petitioner's contention (Pet. 9-12, 20), the court of appeals faithfully applied the categorical approach as prescribed by this Court's decisions in Mathis v. United States, 136 S. Ct. 2243 (2016), Descamps v. United States, 133 S. Ct. 2276 (2013), and Moncrieffe v. Holder, 569 U.S. 184 (2013). Petitioner suggests (Pet. 9-10) that the court of appeals departed from those decisions by failing to evaluate whether the least culpable conduct penalized by Florida's robbery statute involved "physical force." But the court concluded that all violations of Section 812.13 involve such force. See Pet. App. A1, at 1 ("[A] conviction under the Florida robbery statute categorically qualifies as a violent felony under the elements clause of the [ACCA], even if it occurred before 1999."); ibid. ("[T]he Florida Supreme Court has held that Florida robbery 'has never included a theft or taking by mere snatching because snatching is theft only and does not involve the degree of physical force needed to sustain a robbery conviction.'") (quoting United States v. Fritts, 841 F.3d 937, 942 (11th Cir. 2016), cert. denied, 137 S. Ct. 2264 (2017)).

c. Petitioner cites several Florida appellate decisions (Pet. 24-25) that he argues demonstrate that Florida robbery may involve no more than de minimis force. But those cases do not establish that Florida robbery may involve a degree of force less than the "physical force" required by the ACCA's elements clause.

In Montsdoca v. State, supra, the Florida Supreme Court stated that "[t]he degree of force used is immaterial," but only if "such force * * * is actually sufficient to overcome the victim's resistance." 93 So. at 159. Montsdoca involved the "violent or forceful taking" of an automobile, whereby the defendants, under a false pretense of official authority, "grabbed" the victim "by both shoulders," "shook him," "ordered him to get out of the car," and demanded his money "under the fear of bodily injury if he refused." Ibid. Montsdoca thus involved a degree of force greater than de minimis.

In Sanders v. State, 769 So. 2d 506 (Fla. Dist. Ct. App. 2000), the Florida intermediate appellate court affirmed the robbery conviction of a defendant who peeled back the victim's fingers from a clenched fist before snatching money out of his hand. Id. at 507. Bending back someone's fingers with force sufficient to overcome his efforts to keep hold of an object involves more than the "merest touching," Johnson, 559 U.S. at 139, and is "capable of causing physical pain or injury," id. at 140. Indeed, the court contrasted the force used in Sanders with the circumstances of a prior case, in which merely "touch[ing] or brush[ing]" the victim's hand in the course of taking money was "insufficient to constitute the crime of robbery" under Florida law. 769 So. 2d at 507 (discussing Goldsmith v. State, 573 So. 2d 445 (Fla. Dist. Ct. App. 1991)).

In Benitez-Saldana v. State, 67 So. 3d 320 (Fla. Dist. Ct. App. 2011), the court determined that trial counsel rendered ineffective assistance by conceding that the defendant engaged in conduct on which "a conviction for robbery may be based" -- namely, "a tug-of-war over the victim's purse." Id. at 323. The victim testified that in the course of the tug of war, the defendant grabbed her arm, causing an abrasion. Id. at 322. The conduct in Benitez-Saldana thus involved a "degree of force necessary to inflict pain," not unlike "a slap in the face." Johnson, 559 U.S. at 143.

In Hayes v. State, 780 So. 2d 918 (Fla. Dist. Ct. App. 2001) (per curiam), the record reflected that the defendant "bumped" the victim with sufficient force that she would have fallen if not for the fact that "she was in between rows of cars when the robbery occurred." Id. at 919. And in Winston Johnson v. State, 612 So. 2d 689 (Fla. Dist. Ct. App. 1993), the defendant "used sufficient force" not only "to remove the money," but also "to cause slight injury" to the victim's hand. Id. at 691. In each of those cases, the defendant used "force capable of causing physical pain or injury to another person" -- in Hayes, force otherwise strong enough to cause the victim to fall, and in Winston

Johnson, force that actually caused injury. Johnson, 559 U.S. at 140.*

d. Petitioner contends (Pet. 17) that robbery as traditionally defined under the common law did not require any showing that the defendant used more than de minimis force. But this Court is "bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of" Florida robbery. Johnson, 559 U.S. at 138. And the Florida Supreme Court has rejected the view that "the degree of force used to snatch a victim's property from his person, even when the victim does not resist and is not injured, is sufficient to satisfy the force element of Florida's robbery offense." Robinson, 692 So. 2d at 886. That authoritative interpretation of Florida's robbery statute -- not petitioner's contentions regarding "common law robbery," Pet. 18 -- governs whether his prior conviction qualifies as a "violent felony" under the ACCA.

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* Petitioner does not cite McCloud v. State, supra, which in any event would not assist him. The defendant in McCloud "exert[ed] physical force to extract [the victim's purse] from her grasp," causing the victim to fall to the ground. 335 So. 2d at 259. The evidence also "showed that [the defendant] attempted to kick his victim while she lay on the ground and after the purse had been secured." Ibid. The force employed by the defendant in McCloud was plainly "capable of causing physical pain or injury to another person" and would thus qualify as "physical force" under the ACCA's elements clause. Johnson, 559 U.S. at 140. The court's statement that "[a]ny degree of force suffices to convert larceny into a robbery," McCloud, 335 So. 2d at 258, was therefore dictum, which was effectively repudiated in Robinson, 692 So. 2d at 886.

2. Although a shallow conflict exists between the Ninth and Eleventh Circuits on whether Florida robbery in violation of Section 812.13 qualifies as a "violent felony" under the ACCA's elements clause, that conflict does not warrant this Court's review.

a. The outcomes in the cases petitioner identifies in the petition (Pet. 20-23) and his first supplemental brief (Supp. Br. 1) arise not from any disagreement about the meaning of "physical force" under Johnson, but from differences in how States define robbery. Some courts of appeals have determined that a State's definition of robbery does not satisfy the ACCA's elements clause because "even de minimis contact" can constitute the force necessary to support a robbery conviction. United States v. Gardner, 823 F.3d 793, 803 (4th Cir. 2016).

In Gardner, for example, the Fourth Circuit understood North Carolina law to require only that the "degree of force" be "sufficient to compel the victim to part with his property." 823 F.3d at 803 (citation omitted). In United States v. Winston, 850 F.3d 677 (2017), the Fourth Circuit understood Virginia law to require "only a 'slight' degree" of force, id. at 684 (citation omitted), a standard satisfied by a "defendant's act of 'physical jerking,' which was not strong enough to cause the victim to fall," id. at 685 (citation omitted). And in United States v. Yates, 866 F.3d 723 (2017), the Sixth Circuit understood Ohio law to require

only "nonviolent force, such as the force inherent in a purse-snatching incident or from bumping against an individual." Id. at 732; see also United States v. Mulkern, 854 F.3d 87, 93-94 (1st Cir. 2017) (Maine robbery); United States v. Eason, 829 F.3d 633, 641-642 (8th Cir. 2016) (Arkansas robbery); United States v. Parnell, 818 F.3d 974, 978-980 (9th Cir. 2016) (Massachusetts armed robbery). In those cases, the degree of force required under state law was not sufficient to satisfy the ACCA's elements clause.

In other cases, such as this one, a court of appeals has determined that a State's definition of robbery does satisfy the ACCA's elements clause because the State requires force greater than the de minimis amount necessary to remove the property from the person. In United States v. Harris, 844 F.3d 1260 (2017), petition for cert. pending, No. 16-8616 (filed Apr. 4, 2017), for example, the Tenth Circuit relied on Colorado precedent stating that "the gravamen of the offense of robbery is the violent nature of the taking." Id. at 1267 (citation omitted). And other courts -- including the Fourth and Sixth Circuits, which petitioner places on the other side of his alleged conflict -- have reached similar state-statute-specific conclusions as to particular robbery offenses. See, e.g., United States v. Patterson, 853 F.3d 298, 302-305 (6th Cir.) (Ohio aggravated robbery), cert. denied, 138 S. Ct. 273 (2017); United States v. Doctor, 842 F.3d 306, 311-312 (4th Cir. 2016) (South Carolina robbery), cert. denied, 137 S. Ct.

1831 (2017); United States v. Duncan, 833 F.3d 751, 754-756 (7th Cir. 2016) (Indiana robbery); United States v. Priddy, 808 F.3d 676, 686 (6th Cir. 2015) (Tennessee robbery), abrogated on other grounds, United States v. Stitt, 860 F.3d 854, 855 (6th Cir. 2017) (en banc).

Because differences in state definitions of robbery explain why robbery in some States, but not others, is a "violent felony," the courts' decisions do not suggest any conflict meriting this Court's review. Cf. Winston, 850 F.3d at 686 ("The state courts of Virginia and North Carolina are free to define common law robbery in their respective jurisdictions in a manner different from that employed by federal courts in construing a federal statute.").

b. In United States v. Geozos, 870 F.3d 890 (2017), the Ninth Circuit determined that Florida robbery is not categorically a "violent felony." Id. at 901. The Ninth Circuit acknowledged that under Robinson, "there must be resistance by the victim that is overcome by the physical force of the offender." Id. at 900 (quoting Robinson, 692 So. 2d at 886). But the Ninth Circuit read the Florida cases to mean that "the Florida robbery statute proscribes the taking of property even when the force used to take that property is minimal." Id. at 901. The Ninth Circuit recognized that its decision "put [it] at odds with the Eleventh Circuit," but it suggested that the Eleventh Circuit had

"overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force." Ibid.

The shallow conflict between the Ninth and Eleventh Circuits does not warrant this Court's review. This Court has repeatedly denied petitions for writs of certiorari that raised the same issue of whether Florida robbery is a "violent felony." See United States v. Bostick, 675 Fed. Appx. 948 (11th Cir.) (per curiam), cert. denied, 137 S. Ct. 2272 (2017); United States v. McCloud, No. 16-15855 (11th Cir. Dec. 22, 2016), cert. denied, 137 S. Ct. 2296 (2017); Fritts, 841 F.3d 937, cert. denied, 137 S. Ct. 2264 (2017); United States v. Seabrooks, 839 F.3d 1326 (11th Cir. 2016), cert. denied, 137 S. Ct. 2265 (2017); United States v. Durham, 659 Fed. Appx. 990 (11th Cir. 2016) (per curiam), cert. denied, 137 S. Ct. 2264 (2017). Notwithstanding the narrow conflict created by the Ninth Circuit's recent decision in Geozos, supra, the same result is warranted here.

Although the issue of whether Florida robbery is a "violent felony" arises under the ACCA, it is fundamentally premised on the interpretation of a specific state law. The Ninth and the Eleventh Circuits may disagree about the degree of force required to support a robbery conviction under Florida law, but as petitioner's extensive discussion of state-court decisions demonstrates (Pet. 20-26), that state-law issue turns on "Florida caselaw." As such,

the issue does not warrant this Court's review. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) ("Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located."), abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

The issue of whether Florida robbery is a "violent felony" also does not present an issue of broad legal importance. The issue arises only with respect to defendants with prior convictions for Florida robbery. Accordingly, the issue is unlikely to recur with great frequency in the Ninth Circuit, which sits on the other side of the country. Should that prove to be incorrect, there will be ample opportunity for the government to seek further review in that circuit or in this Court. At this time, however, the issue is not of sufficient recurring importance in the Ninth Circuit to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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